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No. 88-1285 (3)

In The

Supreme Court of the United States

October Term, 1988

INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY TO BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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ARGUMENT

Respondent argued to the Tenth Circuit that the Board's decision in this case was consistent with *Wright Line Inc.*, 251 N.L.R.B. 1083 (1980), because pretextual reasons for discrimination do not rebut a *prima facie* showing of discriminatory intent. Now Respondent argues that the *Wright Line* analysis does not apply at all here because of the Board's "finding" in this case that Petitioner's asserted reasons for terminating Tate were

pretextual. Respondent apparently has revised its position in an attempt to excuse the Board's failure to apply *Wright Line* in this case, while at the same time seeking to re-cast the issue on appeal in terms of whether there exists substantial evidence to support the Board's "finding."

Respondent's Brief in Opposition urges affirmation of a two-tiered approach to dual motive cases not contemplated by the *Wright Line* decision itself or by this Court in *N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393 (1983). According to Respondent there exists one class of cases, denominated "pure dual motive cases" in which the employer's affirmative defense that it had legitimate, non-discriminatory reasons for its actions is considered on its merits. A second class of cases, so-called "pretext" cases, does not require consideration of an employer's affirmative defense that it had legitimate, non-discriminatory reasons for its actions. Respondent contends this is a "pretext" case, therefore, inquiry into the issue of whether there was cause for Tate's discharge is foreclosed by the Board's "finding" of pretext.

The *Wright Line* decision does not support the distinction now advanced by Respondent. Although the Board in *Wright Line* discussed the difference between pretext and dual motive in Part I of its decision, it did so because the distinction was "useful in setting forth the controversy surrounding dual motive cases." *Wright Line*, 251 N.L.R.B. at 1083 n. 4. The *Wright Line* opinion repeatedly states that the Board's adoption of the *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), analysis was intended to do away with any need to distinguish between pretext and dual motive

cases.[1] The Board adopted the *Mount Healthy* test in part to provide an employer "with a formal framework within which to establish its asserted legitimate justification." 251 N.L.R.B. at 1089.

Respondent implies this Court gave its *imprimatur* to the pretext-dual motive distinction when it approved the Board's *Wright Line* analysis in *Transportation Management Corp., supra. Transportation Management Corp.* approved the Board's adoption of a *Mount Healthy* test where an employer asserts a non-discriminatory reason for its action; in no way does that decision endorse the out-of-hand rejection of an employer's asserted justification for its actions outside the *Mount Healthy* framework. In *Transportation Management Corp.* this Court held that Section 10(c) of the National Labor Relations Act does not forbid shifting the burden to an employer to prove that, absent improper motivation, it would have acted in the

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[1] The *Wright Line* decision states:

"As is demonstrated herein, under the *Mount Healthy* test, there is no real need to distinguish between pretext and dual-motive cases."

251 N.L.R.B. at 1083 n. 4.

"The conceptual problems to which this sometimes blurred distinction [between pretext and dual-motive cases] gives rise can be eliminated if one views the employer's asserted justification as an affirmative defense."

251 N.L.R.B. at 1084 n. 5.

"Still an additional benefit which will result from our use of the *Mount Healthy* test is that the perceived significance in *distinguishing between pretext and dual-motive cases will be obviated.*"

251 N.L.R.B. at 1089 n. 13 (emphasis added).

same manner for wholly legitimate reasons. However, the Court did not approve a rule foreclosing an employer from meeting that burden solely because of the volume of evidence showing anti-union animus, which rule the National Labor Relations Board and the Tenth Circuit followed in this case.

Section 10(c) of the National Labor Relations Act directs that no order of the Board may reinstate or compensate any employee who was terminated for cause. The *Wright Line* analysis was consistent with the mandate of that provision in that it afforded employers the opportunity to demonstrate that an employee had been terminated for cause, irrespective of any anti-union animus. The "pretext" analysis advanced by Respondent and endorsed by the Tenth Circuit in this case precludes inquiry into the issue of cause and denies employers the benefit of the defense mandated by *Wright Line* and *Transportation Management Corp.* In *Wright Line* the Board declared that "we shall henceforth employ the [*Mount Healthy*] test *in all cases* alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. 251 N.L.R.B. at 1089 (emphasis added). Now the Board seeks to deny Petitioner its right to justify its conduct, in complete disregard of its obligation not to reinstate employees terminated for cause.

In this case Respondent urges that the Board "judged" Petitioner's explanation pretextual, yet there was no determination whether other employees would have been denied leave under similar circumstances or whether other employees would have been terminated if they had taken an unauthorized leave after being

directed to report to work.[2] The evidence relied upon by the Board and the Court of Appeals as proof of pretext is simply evidence of general anti-union animus.

The Sixth Circuit has unequivocally rejected the Board's position that a *prima facie* showing of anti-union animus may be so strong that rebuttal evidence proferred by an employer can be rejected without reference to the *Wright Line* analysis. *Lawson Company v. N.L.R.B.*, 753 F.2d 471, 476 (6th Cir., 1985). Respondent correctly notes that at least one Circuit, however, has held that *Wright Line* may be dispensed with upon a "finding" of pretext. *N.L.R.B. v. American Geri-Care, Inc.*, 697 F.2d 56, 63-64 (2nd Cir., 1982), *cert. denied*, 461 U.S. 906 (1983). This conflict should be addressed by this Court.

The analysis employed by the Tenth Circuit here and urged by Respondent resulted in an illusory "finding" of pretext based solely on evidence of anti-union animus, without consideration of whether there was independent cause for termination. One consequence of this analysis is that employees terminated for cause may be reinstated without consideration of their misconduct, simply upon the Board's designation of pretext. Such an analysis would not be permitted in the Sixth Circuit and should

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[2] The employee in this case requested a week's leave, which was denied. Subsequently she produced a doctor's note saying she should be excused from work during that week. When her supervisor rejected this transparent ploy and directed her to report to work that week, she refused to do so. It has never been suggested that this insubordination would not ordinarily constitute just cause for termination. Indeed, the administrative law judge characterized this conduct as presenting a "sure-fire chance to terminate Tate." (App. 51).

not be allowed elsewhere, as it is not consistent with the Board's own *Wright Line* standards.

CONCLUSION

This case brings into focus the Board's resurrection of the old distinction between pretext and dual motive, a distinction which was "obviated" by *Wright Line,* 251 N.L.R.B. at 1089 n. 13, and a distinction the Sixth Circuit certainly rejects. Here the Court has an opportunity to rule once and for all that when the National Labor Relations Board adopted the *Wright Line* test for *all* Section 8(a)(1) and 8(a)(3) cases turning on employer motivation, the artificial distinction between pretext and dual motive was abolished. The Board admits that it failed and refused to apply the *Wright Line* analysis in this case. The Tenth Circuit's approval of that failure was error. Accordingly, Petitioner's application for a Writ of Certiorari should be granted.

Respectfully submitted,

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